Supreme Court, U.S.
FILED
OCT 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

87 534

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ARTHUR MOATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Arthur Moates, by his attorney, petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

QUESTION PRESENTED

1. Whether the court committed reversible error when it allowed the government to present vital testimony from a police officer that he had elicited from a co-defendant,

prior to any arrest, about petitioner's actions as the head of the cocaine operation, said statements having been made to the officer in his office while the declarant was a paid informant seeking the release of a boyfriend from jail.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is unreported. The jurisdiction of the court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecution, the accused shall enjoy the right. . . to be confronted with the witnesses against him. . .

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STATEMENT OF THE CASE

On July 24, 1986, a jury, sitting in Greenville, South Carolina, found petitioner Arthur Moates and four (4) others guilty of numerous counts of conspiracy and narcotic distribution counts.[1] The trial followed an extensive

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[1] In violation of Title 21, U.S.C. Section 841(a)(1), 843(b)(c), 841(a)(1) and 18 U.S.C. Section 2.

investigation in which a court-ordered wire tap was utilized on a phone located at petitioner's place of business. Following certain wire interceptions the Greenville City Police seized one kilogram of cocaine on March 28, 1986. The bulk of the government's case was the wiretaps, an expert to interpret what the declarants were talking about (in code) and evidence of surveillance and the seizure of cocaine. At no time did petitioner ever mention drugs or get caught handling drugs.

The issue presented here is simple. Greenville City Detective Harold Atkins, Jr., the equivalent of the case agent, testified as to his investigation and then as an expert on the de-coding of the wiretap conversations. He was allowed to *testify* at trial as to meetings he had with co-defendant Sophia Floyd (who was on trial with Moates and others) in mid-October 1985 at his office. Atkins testified that Ms. Floyd "was wanting to work a deal to cooperate with (the police) in an effort to help her boyfriend (in an unrelated case) and the paramour of her sister (Benae Floyd, also a defendant tried with petitioner) who was at that time serving time for a drug related charge." Atkins told the jury, over defense objections, about his conversations with co-defendant Floyd. Those conversations specified her drug deals in the past and the relationship of her criminal acts to the activities of petitioner Moates and co-defendant Richard Neely.[2] Some background that demonstrates the trial court's advance knowledge of the impropriety comes from a *Franks* v. *Delaware* hearing, 438 U.S. 154 (1978).

Special Agent Anthony Durante testified that Sophia Floyd had been a paid Greenville County informant since

[2] The Fourth Circuit opinion reversed and remanded Neely's conviction for a new trial and determined error as to Moates was harmless due to the amount of evidence against him. (See (A-1), the unpublished opinion.)

October 1985 and that she had provided information about the Broad Street area (and Moates' operation). The wiretap evidence then showed corroboration of that hearsay by demonstrating conversations between Moates and Ms. Floyd. (Trial Tr. 37-46) A pen register showed frequent calls between Moates and Neely. Durante testified that he had been aware (as a narcotics officer) of Moates for one and a half years and Neely for three and one half to four years.

At trial Agent Durante testified, before the jury, that "I received some information about an operation with the Greenville Police Department that a group of individuals from Miami were frequenting that area and distributing kilos of cocaine. . . We attempted undercover police purchases, the use of confidential informants, physical surveillance and other investigative techniques." (Trial Tr. I, 18-20) Immediately following said improper testimony, Agent Durante identified a photograph of the service station of Petitioner Moates, taken on surveillance. Next evidence was introduced of hearsay, statements made by a courier arrested in Atlanta, George *re* delivering five (5) kilos to a black man in Greenville. Petitioner Moates was subsequently described as that black man. Thereafter, the courier, Rafael Galano, testified as a government witness, sentenced to four years. He stated that his supplier was a Latin man named Nelson Aguilar. He described Petitioner and visits to his service station (the one identified by Agent Durante from the surveillance photograph) and identified Moates as the man he delivered cocaine to in 1983 or '84 at the LaQuinta Motel in Woodruff, South Carolina. The court allowed the evidence over objection, under Rule 404(b), *Federal Rules of Evidence.* None of Galano's testimony was corroborated. In fact he wore a wire, undercover, and talked to Petitioner, but nothing taped related to a drug deal, past, present or future, and the conversa-

tion supported petitioner's position that Galano was lying.[3]

Galano then described a deal at the LaQuinta Motel where he met co-defendant Sophia Floyd. Galano admitted that he did not deliver cocaine to Moates and that the March 1986 proposed deal was never consumated. (Trial Tr. I, pp. 62-63)

Paula Bright testified as to her involvement with Petitioner Moates and his co-defendant Neely (whose case was reversed and remanded by the 4th Circuit on the issue of this Writ of Certiorari). There was no corroboration of what she said. She was given immunity for her testimony. (Trial Tr. I, pp. 85-87, 92-107)

Prior to Officer Atkins' testimony there was little evidence to support a jury conclusion of guilty beyond a reasonable doubt. Things changed.

Atkins testified that he began the investigation in March 1984, that he knows Sophia Floyd, that Ms. Floyd wanted a deal to help her boyfriend, who was confined, and as to what Ms. Floyd told him. Objections were over-ruled by the trial court who commented when counsel referred to *Bruton* v. *United States,* 391 U.S. 123 (1968), *"all right!* Do you (U.S. Attorney) want to reply?"

> *The Prosecutor:* "Well, Your Honor, if you've (already) made the ruling that it (these statements made to Atkins in his office as a paid informant) is in fact a statement of a co-conspirator, the rule (*Bruton, supra*) doesn't apply."
>
> *The Court:* "I follow you! I've already ruled. Bring them (the jury) in." (Trial Tr. I, 148-149)

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[3] The tape was not played; Galano said no deal was struck because the price was too high. Moates denied such a topic.

What followed is testimony beyond belief. Officer Atkins described Ms. Floyd as a confidential informant who told him that Moates had supplied her with cocaine as well as to a group of people. One of those supplied was co-defendant Neely. The jury heard that Moates had asked Neely to get a large sum of money for a cocaine deal that was "going down," that Neely sent Sophia Floyd to get it and that she did and the deal occurred. The jury heard of regular conversations with petitioner, one of which was for her to take a satchel full of money to the LaQuinta Motel. Thereafter, Moates and Floyd, per Atkins' hearsay, went to the motel and Moates went into a bathroom with a Cuban named Nelson and came out with a bag of cocaine and without the satchel of money. Atkins described conversations that Floyd had with Neely about why he was involved in the cocaine business with Moates. The jury heard how a Princess Brown was getting (6 to 7) grams of cocaine per week from Moates. Atkins then described how he dropped Ms. Floyd as an informant shortly thereafter because she had lied to him about whether she was still involved in the drug dealing at the time.[4] (Trial Tr. I, 152-158)

It is clear to anyone who reads the trial record that the evidence that caused petitioner's conviction was not the wiretap and proper police surveillance and evidence but the hearsay testimony of Detective Atkins attributing devastating remarks to Ms. Floyd, a co-defendant, about petitioner, which could not be confronted/cross-examined.

On June 18, 1987, the Fourth Circuit reversed and remanded the case as to Appellant Neely (who was serving

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[4] His evidence was Ms. Floyd denied it but the wiretaps picked her up as discussing meetings that she was denying.

a 32-year sentence) but affirmed as to Moates (Petitioner), Eire, Benae and Sophia Floyd.[5] The court concluded that the evidence admitted through Detective Atkins was totally improper. It held that since the only evidence as to Neely was three intercepted phone calls and those calls were explained through Atkins' decoding, based on Ms. Floyd's inadmissible statements out of court to Atkins, then there could be no harmless error.

Petitioner filed for a hearing *en banc* which was denied on August 4, 1987.

REASONS FOR GRANTING THE WRIT

This case presents a very basic question which this Court must address. That is where a trial is held and two alleged leaders of a conspiracy are damaged by clearly inadmissible hearsay evidence, there must be a new trial as to both (not one) because a jury cannot properly find criminal intent and knowledge where their minds are already contaminated by inadmissible hearsay evidence that denies the right to confrontation clause of the *United States Constitution.*

ARGUMENT

The legal profession adamantly believes that cross-examination is the primary interest secured by the confrontation clause. Former Chief Justice Burger wrote,

> ". . . (cross-examination) is the principal means by which the believability of a witness and the

[5] Clearly, the statements were admissible as to the declarant, though it should have been in a separate trial as *Bruton, supra,* requires. The hearsay statements as to Eire and Benae Floyd were harmless as they made no reference to either.

> truth of his testimony are tested." *Davis* v. *Alaska,* 415 U.S. 308, 316 (1974).

In *Chambers* v. *Mississippi,* 410 U.S. 284, 295 (1973), this Court held:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the Constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process. . ." It is, indeed, "an essential and fundamental requirement for the kind of a fair trial which is this country's Constitutional goal."

The error committed by the trial court in petitioner's case is frightening. How any federal judge can preside over a narcotics conspiracy trial and allow the prosecution to elicit testimony, offered for the truth of the matter asserted, based on what a co-defendant (on trial) said in the policeman's office about petitioner, while being paid as an informant and trying to win a boyfriend's release from jail is beyond comprehension! Any law student is familiar with *Bruton* v. *United States,* 391 U.S. 123 (1968). Ms. Floyd's remarks to Detective Atkins were not in the furtherance of a conspiracy; they were statements being sold for money to free a boyfriend. *Bruton* outlaws such an abuse of the confrontation clause.

To make matters worse, the Assistant United States Attorney argued at trial and before the 4th Circuit (to the disbelief of the panel) that Ms. Floyd's statements to Atkins were in the furtherance of the conspiracy and were reliable. Rule 801(d)(2)(e), *Federal Rules of Evidence,* and *United States* v. *Urbanik,* 801 F.2d 692 (4th Cir. 1986) make abundantly clear how egregious the error was in the instant case. *Urbanik, supra* was reversed where a co-defendant told his partner in crime, while lifting weights after the delivery of cocaine, that he could get his partner

any amount of drugs he wanted, anytime. The court reasoned, over Judge Russell's dissent,[6] that the statement made while lifting weights was after the criminal act, therefore not in furtherance of the conspiracy and should have been excluded as hearsay.

In its brief to the Fourth Circuit, the government conceded that Sophia Floyd was "a confidential informant" and that Atkins lifted her immunity because she had been lying to him about her involvement in drugs. (Appellee brief, p. 22) Such concessions best demonstrate why the courts view, *with great caution,* the information of an informant and why the confrontation clause is so crucial to the concept of due process.

This court held in *Dutton* v. *Evans,* 400 U.S. 784, 81 (1970), that out-of-court statements are inadmissible unless "in the furtherance of the conspiracy." The Fourth Circuit has found that Atkins' testimony was improper, not within *Dutton, supra* and reversed as to Neely but ruled harmless as to Petitioner. Such a finding is unfair, not supported by the trial record, contrary to *Urbanik, supra* and denies due process of law. Simply stated, what is fair and Constitutional is that statements offered by a witness while acting as a confidential informant to curry favor outside a conspiracy are just not admissible evidence. Any federal judge should know that and if he does not then one wonders why he should preside over such a trial. To allow the government a pass here based on such ignorance of the law or deliberate bad faith would be a miscarriage of justice. Petitioner received the brunt of the hearsay barrage; yet, he is serving 104 years in prison while Neely got a new trial. This is not fair.

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[6] Judge Russell clearly led the court from the bench in reversing the case as to Neely below.

The reasoning of the court in reversing and remanding the case as it applies to Neely is sound but is inconsistent with the facts as pertain to Petitioner. It is not harmless error. The Fourth Circuit could not have carefully reviewed the trial record; they could not have done so and reversed as to Neely and affirmed as to Moates. Counsel repeats; the bulk of Detective Atkins' hearsay remarks, attributable to Ms. Floyd, dealt with Petitioner Moates. There were wiretaps of Moates talking to others. Moates testified and explained what he was talking about and that his references were not about drugs but about his car cleaning business. He explained how he knew a Nelson Aguilar from hunting trips and why he had been to the LaQuinta Motel and left prior to any seizure of cocaine.[7] He did not know a deal was happening. Without Detective Atkins' testimony *re* Floyd's statements about Moates dealing over $162,000 cocaine with her, knowing a supplier of cocaine from Cuba named Nelson, doing a deal at the LaQuinta previously in her presence and Atkins' subsequent translation of the taped conversations of Moates, defining them as drug related there would have been no conviction of Petitioner. Atkins' testimony totally destroyed Moates and made his testimony laughable to a jury. Due process does not give Neely more of a right to confrontation than Moates. The trial judge's irrational ruling was horrible error and this Court should require the Solicitor General to justify the prosecutor's actions in deliberately offering such elementary error as testimony before the jury.

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[7] Moates barely knew Aguilar whom he had met when Aguilar passed through Woodruff on a hunting trip.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for A Writ of Certiorari has been served by mail upon the Honorable Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530, and Samuel Rosenthal, Esquire, Appellate Section, Criminal Division, U.S. Department of Justice, P.O. Box 899, Washington, D.C. 20044; John W. McIntosh, Esquire, 1st Assistant United States Attorney, P.O. Box 2266, Columbia, South Carolina 29202.

Kenneth Michael Robinson